United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-1265

To be argued by
RONALD L. GARNETT

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-1265

UNITED STATES OF AMERICA,
Appellee,

—v.—

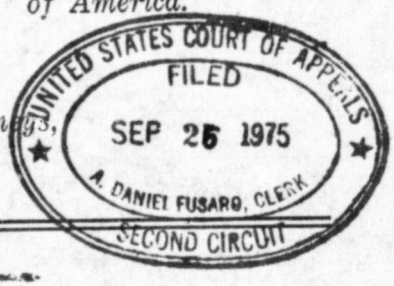
WILLIAM PATE DeVONE,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES OF AMERICA

PAUL J. CURRAN,
United States Attorney for the Southern District of New York, Attorney for the United States of America.

RONALD L. GARNETT,
MICHAEL B. MUKASEY,
Assistant United States Attorneys, Of Counsel.



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Defendant-Appellant.

BRIEF FOR THE UNITED STATES OF AMERICA

Preliminary Statement

William Pate DeVone appeals from a judgment of conviction entered on July 9, 1975, in the United States District Court for the Southern District of New York, after a two-day trial before the Honorable Lee P. Gagliardi, United States District Judge.

Indictment 75 Cr. 283, filed March 18, 1975, charged DeVone in twelve counts with uttering stolen and forged United States Treasury checks in violation of Title 18, United States Code, Section 495, and possessing stolen mail in violation of Title 18, United States Code, Section 1708.

Trial commenced before Judge Gagliardi on May 28, 1975. On May 30, 1975, DeVone was found guilty on five counts of the Indictment. On July 9, 1975, Judge

Gagliardi sentenced DeVone to a term of imprisonment of three months on each of the five counts, to run concurrently. DeVone has been enlarged on bail pending this appeal.

Statement of Facts

Government's Case

The Government's case was presented through the testimony of five witnesses. Derry Allen, Manager of the Shopwell supermarket on Featherbed Lane, Bronx, New York, testified that beginning in May, 1974, and continuing through August, 1974, DeVone, an employee, had requested that he authorize a number of checks for encashment at the store. On the first occasion he recalled DeVone presented a transit authority check which DeVone said belonged to his brother-in-law. This check was later returned to the store as forged, and upon confronting DeVone with this fact, Allen was told by DeVone that his brother-in-law stopped payment on it because they had an argument. Allen identified eleven of the twelve checks introduced in evidence, which were stipulated to have been stolen and forged, as checks authorized by him for encashment and containing DeVone's signature (Tr. 41-43).* Allen further testified that during August, 1974, the checks first began to be returned to Shopwell as forgeries. When confronted with this fact, and that he would have to make restitution, DeVone said nothing and continued his silence concerning the checks until November 26, 1974, the day of his arrest (Tr. 47, 65).

Roy Nedrow, Special Agent United States Secret Service testified that on November 26, 1974, after advis-

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* Numerical references are to the page numbers of the trial transcript.

ing DeVone of his constitutional rights, he discussed the stolen and forged checks with DeVone. DeVone told him that a person named "Bubba" had come to him in May, 1974, with a proposal to cash stolen checks through the Shopwell store. DeVone first rejected this scheme, but about one week later he was accosted by Bubba, who shoved him, but did not strike him, and told DeVone he *would* join the scheme, or if he did not participate, he, Bubba, would "take care" of DeVone, his wife and his children. DeVone told Nedrow he did not see a gun, but that Bubba at that time showed him what appeared to be the handle of a gun (Tr. 70-71, 73-74). Following this encounter DeVone said Bubba and eight to ten other people came into the store and presented checks to DeVone identifying the source of the checks by saying Bubba had sent them to DeVone. DeVone further stated that between twenty and forty checks were cashed in this manner, and that he had received no monies from Bubba; his only motivation was to protect himself and family. However, DeVone told Nedrow that none of the persons presenting checks to him from Bubba had threatened him and that he had no conversation with them other than that the checks were from Bubba.

Nedrow then asked DeVone when the cashing of these checks for Bubba terminated. DeVone said that he had gone to Bubba when the checks began to be returned to the store as forged, and Bubba refused to give him any money to repay the store. DeVone told Nedrow he never saw Bubba after that discussion and he never cashed any other checks (Tr. 74-75). DeVone said he never told anyone of this story because of his fear, although he was never again threatened by Bubba (Tr. 77).

Nedrow testified that on January 6, 1975, he had located and interviewed Isaac Gary, also known as

Bubba,* who denied any involvement in cashing stolen checks (Tr. 84-86). Isaac Gary testified that he never cashed stolen checks, that he did not know where DeVone lived, and that he did not know DeVone was married and had four children. Further, he stated he never carried a weapon on his person, never threatened or physically assaulted DeVone, and never entered the Shopwell or sent someone else into the store for him. (Tr. 107-110, 142). Under cross examination, Gary readily admitted committing some acts of violence (Tr. 117-122), and selling heroin (Tr. 138-39, 144-145), but denied any involvement with DeVone in cashing stolen checks (Tr. 142). Gary finally testified that he was testifying at the trial only because he had been falsely accused (Tr. 147-48).

Daisy Brown testified that she was employed as a cashier at the Shopwell Market on Featherbed Lane and that she resided at 1597 Jessup Avenue in the Bronx, near the market. She testified that she and DeVone continuously and exclusively lived together in the Bronx from February through September, 1974, a period including the period DeVone authorized the cashing of the stolen and forged checks.** She denied having four children, but admitted having one child, a boy six years of age (Tr. 151-52). DeVone had never told her, during February through September, 1974, that Gary had threatened him (Tr. 154), and never told her even after DeVone's arrest of any threats by Gary or of any involvement by Gary in cashing stolen checks (Tr. 156-57).

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* At the time of trial Isaac Gary had been incarcerated at the New York City Correctional Institution for Men at Rikers Island, Queens, New York, since October 22, 1974, for the unauthorized use of an automobile (Tr. 84, 105).

** During the interview with Nedrow, and a subsequent interview with an Assistant United States Attorney, DeVone gave a personal history stating that he resided with Marie Ramsey and her four children at 2979 Eighth Avenue, Apt. 18N in Manhattan for six years (Tr. 77-79).

The Government next called Archie Melton * who testified that he had cashed stolen checks on prior occasions at the Shopwell on Featherbed Lane, but that he had stopped doing so when Allen, the manager, discovered that the checks were forged. Although he had previously known DeVone, he met him in a bar one night and asked DeVone if DeVone could cash stolen checks for him. DeVone stated that he would try. They agreed that Melton would bring a check to DeVone the next day, which he did. The check was cashed and DeVone and Melton shared the proceeds equally. They continued this arrangement for three weeks during which time approximately fourteen or fifteen checks were cashed (Tr. 174-75). Melton testified that he would sign the payee's endorsement on the checks, sometimes camouflaging his writing, and then give the checks to DeVone. Melton identified seven checks from among the Government Exhibits as checks he had forged and given directly to DeVone (Tr. 176-77; Gxs. 1, 2, 3, 4, 5, 6 and 9). He also identified another check, not charged in the indictment, as one he had forged and given to DeVone (Tr. 178-79; Gx. 21). Following Melton's testimony, the Government rested.

Defense Case

The defendant offered no evidence.

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* At the time of trial Melton was serving concurrent sentences in connection with two convictions of forging and theft of mail, both relating to cashing stolen and forged checks.

ARGUMENT

POINT I

The conduct of the prosecutor did not deprive DeVone of a fair trial.

DeVone argues that the Assistant United States Attorney engaged in instances of prosecutional misconduct in the Government's opening statement and its summation to the jury which thereby deprived him of a fair trial. This argument is based on a convenient lifting out of their context, and a rearrangement out of their original order, of the prosecutor's statements. These remarks, viewed in the context of the entire trial, were quite within the bounds of propriety and did not prejudice DeVone.

A. The Government's Opening Statement

DeVone's claims of error in the Government's opening are based entirely on excerpts that are not only torn from their context but passed without objection at trial from DeVone's experienced counsel. However, absent plain error, "counsel for the defense cannot as a rule remain silent, interpose no objections, and after a verdict has been returned seize for the first time on the point that the comments to the jury were improper and prejudicial." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-39 (1940); *United States* v. *Perez*, 426 F.2d 1073, 1081 (2d Cir. 1970), *aff'd*, 402 U.S. 146 (1971); *United States* v. *Dibrizzi*, 393 F.2d 642, 645-46 (2d Cir. 1968). These excerpts do not singly or together, constitute error at all, let alone the plain error necessary to justify reversal. Indeed, defense counsel's silence at trial suggests that even to a partisan ear these comments did not, in con-

text, carry the insidious meanings now attached to them by a retrospective analysis.

The excerpts from the prosecutor's opening cited by the defendant appear, in context, as follows:

> You will also hear from Mr. Roy Nedrow, who is a United States Secret Service agent. He interviewed Mr. DeVone, after properly advising him of his rights, and Mr. DeVone admitted that he had authorized these checks.
>
> As we go along, Mr. DeVone begins to realize that he has put himself in a very delicate position with respect to violating the law, hence we have an excuse. Mr. DeVone at the time he was interviewed by Mr. Nedrow found the most flimsy excuses that I believe you will find, and that is that a person known as Bubba threatened to kill me, my wife and family if I didn't cash these checks.
>
> You will hear from Bubba. The Government found Mr. Isaac Gary, also known as Bubba, and I believe that once you have had an opportunity to listen to Mr. Gary, you can determine for yourselves the flimsiness of the excuse of Mr. DeVone.
>
> You will also hear from a few other witnesses who are involved in this case in a periphery way, but the Government will introduce one final witness, Mr. Archie Melton. Mr. Melton is an admitted check thief. He has stolen a number of checks. He's been convicted in this courthouse of stealing and cashing checks.
>
> He will testify that he had an agreement with Mr. DeVone to cash these checks, splitting the proceeds in one half. Of course, they had a condition, or Mr. DeVone had a condition of this agreement, and that is that Mr. Melton [not] bring any checks

that had an amount payable of less than $200, so that he might make a hundred dollars on each transaction.

You will hear the testimony of these witnesses. *As his Honor has instructed you, it is for you to determine the truth or falsity of the statements you hear from that witness stand, and the exhibits which are presented to you.*

I'm quite confident that you will exercise your good judgment, your common sense, and your ability to size up people and determine in your minds whether they are telling the truth.

The question I feel that is important here is whether Mr. DeVone's story of threats by an alleged Bubba is correct. You have to determine that. The question you should also be asking yourselves is, did that man, William DeVone, do specific acts which violated federal law? Did he cash those checks knowingly and willingly? Did he possess that mail knowingly and willingly?

The Government has the burden of proof. This man is presumed to be innocent, and the Government must substantiate its charge against Mr. DeVone beyond a reasonable doubt.

I feel quite confident that you will exercise your reason, your judgment, and upon hearing the facts as introduced through the testimony of witnesses and the exhibits, you will conclude that Mr. DeVone is guilty of these violations beyond a reasonable doubt. (Tr. 24-26) (emphasis added)

This plainly was not an improper expression of personal belief in the guilt of the defendant. *See United States* v. *Meisch*, 370 F.2d 768, 773, 777 (3d Cir. 1966).

There was clearly and unambiguously no intimation that the statements were based on anything but the evidence the Government expected to offer. One need go no further than the defendant's own opening and summation to show that the prosecutor's anticipation of the main issue in the case—whether DeVone's tale of coercion was true or not, was precisely accurate (Tr. 28-29). Moreover, the prosecutor did not say he felt DeVone's excuses were phony, but simply predicted that the jury would so find, a point of view for which he cannot be faulted. *Cf. United States* v. *Sawyer*, 347 F.2d 372, 373, and n. 1 (4th Cir. 1965); *DiCarlo* v. *United States*, 6 F.2d 364, 368 (2d Cir. 1925) (Learned Hand, *J.*)

B. The Government's Summation

DeVone claims that in summation the Assistant United States Attorney expressed his own personal disbelief in DeVone's defense of coercion and placed the prestige and credibility of the United States Attorney's Office behind the prosecution of DeVone, thereby unfairly prejudicing his right to a fair trial. Again, DeVone conveniently lifts a passage of the Government's summation from the record as substantiation for his claim (Brief at p. 9).

During its summation the defense argued that the Government had conducted a slovenly investigation, abused its prosecutorial discretion and precipitated a "tragedy" (Tr. 221) by charging DeVone with the crimes rather than Allen, the Shopwell manager, or Gary or Melton, all three of whom were Government witnesses (Tr. 209-221). The challenged remarks of the prosecutor followed and were in response to the repeated arguments advanced and inferences drawn by the defense that the Government's investigation was incomplete, slanted, un-

duly delayed, and a travesty of justice.* *See United States* v. *Wilner*, Dkt. No. 74-1955 (2d Cir. September 10, 1975), slip op. at 6118; *United States* v. *Dibrizzi*, *supra*, at 646.

Even if the excerpts attacked fairly represented the prosecutor's statements they would not have been improper. *Lawn* v. *United States*, 355 U.S. 339, 359-60 n. 15 (1960). But when the statements are placed in context, and read following a review of the defense arguments during its summation, they are beyond cavil and not prejudicial. *United States* v. *Wilner*, *supra*, at 6117-18; *United States* v. *Martin*, Dkt. No. 74-2293 (2d Cir. September 5, 1975), slip op. at 5925. DeVone should not gain this Court's favor after having induced the prosecutor's response. See *United States* v. *Canniff*, Dkt. No. 75-1078 (2d Cir. August 13, 1975); *United States* v.

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* Defense counsel argued, *inter alia*:

> If you really think about the evidence in this case, if you listen to Judge Gagliardi's charge, we submit that you are going to decide that Mr. DeVone's story is the true story, he had to keep cashing these checks, and once the checks started to come back, Mr. DeVone started to pay back the store, and as soon as the authorities came around, who Mr. DeVone probably knew would be coming around anyway, he decided to tell them everything and seek their assistance and their protection and volunteered to testify against Bubba (Gary), once he had their protection, and what happens? Mr. DeVone ends up being charged here.
>
> * * *
>
> We think that you should ask for more, you should demand of the Government better evidence, harder evidence, and not the uncorroborated testimony of two admitted criminals who have done nothing but steal, rob and cheat all their life, and to convict Mr. DeVone, a man who works nine to five, a man who has been trying to pull himself up, a man who leads a purposeful life, of these charges, would be a travesty of justice (Tr. 220-221).

DeAngelis, 490 F.2d 1004, 1011 (2d Cir.), *cert. denied*, 416 U.S. 956 (1974) (concurring opinion). Moreover, in light of the assertions of defense counsel, it was no more than fair reply for the prosecutor to comment as he did.* *United States* v. *LaSorsa*, 480 F.2d 522 (2d Cir.), *cert. denied*, 414 U.S. 855 (1973); *United States* v. *Tramunti*, 513 F.2d 1087 (2d Cir. 1975); *United States* v. *Bivona*, 487 F.2d 443, 445-48 (2d Cir. 1973); *United States* v. *Santana*, 485 F.2d 365, 370-71 (2d Cir. 1973), *cert. denied*, 415 U.S. 931 (1974).

DeVone claims that the vice of the prosecutor's argument is that it intimated that the indictment was to be considered as evidence against DeVone. (DeVone Brief, p. 9). Yet, in context, the prosecutor was merely responding to the repeated suggestion by DeVone's counsel that others should have been indicated when he said that indictments are not returned without reason (Compare Tr. 220-21 *with* Tr. 228); he was referring not to the indictment against DeVone but to the absence of an indictment against the Government's witness. Assuming *arguendo* that there was prejudice in the prosecutor's statement, the court below effectively cured whatever

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* In ruling on counsel's motion for a mistrial at the end of the arguments, Judge Gagliardi stated:

> The Court: I'll deny the motion. I'll inform the jury that opinion of counsel is of no consequence and they'll be governed by the facts. I think you also did state your personal opinion, Mr. Higgins, in connection with your summation which shouldn't be done, but I know counsel have a way of doing it. And I suppose you can get it over by saying, my opinion is that the facts indicate that, but it is semantics so I'll deny that. I think I corrected it at the time the reference was made to the indictment, and it was the indictment of someone else, but I thought it might have spilled over to here, and I think that was covered adequately.
>
> I think you have indicated throughout this trial that the sole issue is whether or not there was coercion or not, and, as a matter of fact, your summation indicated that. I think your opening indicated it, too.
>
> Mr. Higgins: Yes, your Honor (Tr. 239-40).

prejudice may have otherwise resulted by immediately instructing the jury *sua sponte* that the sole purpose of the indictment was to inform DeVone of the charges against him. *United States* v. *Green*, Dkt. No. 75-1037 (2d Cir., August 29, 1975), slip op. at 5905; *United States* v. *Mallah*, 503 F.2d 971, 979 (2d Cir. 1974), *cert. denied*, 43 U.S.L.W. 3515 (March 24, 1975); *Haberstroh* v. *Montanya*, 493 F.2d 483 (2d Cir. 1974). The Government's summation was well within permissible limits.

POINT II

The Court's supplemental charge was proper.

DeVone contends that the supplemental *Allen* charge given by Judge Gagliardi to the jury was coercive and denied him a fair trial. Under the circumstances of this case, that charge was proper, first, because it was entirely proper in its timing and content, and, second because, in any event, it clearly did not coerce the jury's decision as to the counts on which DeVone was convicted.

Following Judge Gagliardi's charge, the jury withdrew to the jury room to commence its deliberations at 12:19 P.M. on May 30, 1975. A short time thereafter the jury returned a note requesting certain statements and exhibits. The Court complied with the request in part (Tr. 276). At 3:15 P.M. Judge Gagliardi advised counsel that by a second note the jury had requested further instruction as to the definition of knowingly and wilfully, and the defense of coercion (Tr. 277). Following that instruction the jury again retired at 3:18 P.M. At 3:50 P.M. the Court advised counsel that a third note from the jury, informed him that the jury was unable to reach a unanimous decision.

Judge Gagliardi further advised counsel of his intent to bring the jury to the courtroom and inquire if it had reached a unanimous verdict on any counts of the indictment, and that if they had not, he would give them a "straight" *Allen* charge. Defense counsel objected (Tr. 279-80). The jury returned and advised the court that it was in the process of taking a poll on two of the counts. The court allowed the jury to return to the jury room and to continue the poll, and at 4:10 P.M. the jury acquitted DeVone on counts four and six. The court then gave the following charge:

> The Court: Let me suggest this to you: with reference to this note of yours, I want to give you some further instructions. This case is an important one to the Government, and equally it is important to the defendant. It is desirable both from the viewpoint of the Government and the defendant, if a verdict can be reached, that this be done. This, of course, means only a verdict that reflects the conscientious judgment of each juror. This Court does not propose to ask, indeed it does not have the right to ask or inquire how you currently stand as to the defendant on any of the other counts charged in the indictment. It is normal for jurors to have differences. Indeed, it is quite common. Frequently jurors, after extended discussion, may find that a point of view which originally represented a fair and considered judgment might well yield upon the basis of argument, further discussion, and upon a further review of the facts and the evidence.
>
> Remember, also, and I emphasize this, *no juror must vote for any verdict unless, after full discussion, consideration of the issues and exchange of views, that verdict represents his or her considered judgment.* Often further consideration

may indicate that a change of one's original attitude is fully justified upon the law and the facts. To aid you in your further deliberations, I am going to quote to you a statement from the Supreme Court decision of the United States in a case where the jury sought to report a disagreement.

This is what the Supreme Court had to say on that occasion:

"Although verdicts must be the verdict of each individual juror and not a mere acquiescence in the conclusions of his fellows, they should examine the question submitted with candor and with a proper regard and deference to the opinions of each other. They should listen, that if the much larger number were for conviction, a dissenting juror should consider whether his doubt was a reasonable one which made no impression upon the minds of some jurors equally honest, equally intelligent as himself. If, upon the other hand, the majority were for acquittal, the minority ought to ask themselves whether they might not reasonably doubt the correctness of the judgment which was not concurred in by the majority."

That quotation sets forth a viewpoint that you might well want to consider as you resume your deliberations. *But please remember that you must review the evidence and you must vote finally according to your own conscientious judgment.* As I said at the outset, this case is equally important to both the Government and the defendant. If a verdict can be reached, it is desirable both from the viewpoint of the Government and the defendant that this be done.

And, finally, I want you to remember that you are not partisans. You are judges, judges of the facts. Your sole interest here is to seek the evidence, seek the truth from the evidence in the case.

I would urge upon you to retire and consider what I have said here and continue your deliberations. Tr. 283-85) (Emphasis added)

The jury retired to the jury room at 4:15 P.M. The defense counsel did not object to this instruction as delivered. At 5:40 P.M. the jury delivered its verdict. There was no error in Judge Gagliardi's supplemental charge.

The *Allen* charge, originally approved by the United States Supreme Court in *Allen* v. *United States*, 164 U.S. 492 (1896), has been upheld by this Court in *United States* v. *Tyers*, 487 F.2d 828, 832 (2d Cir. 1973), *cert. denied*, 416 U.S. 971 (1974); *United States* v. *Jennings*, 471 F.2d 1310, 1313-14 (2d Cir.), *cert. denied*, 411 U.S. 935 (1973); *United States* v. *Adcock*, 447 F.2d 1339 (2d Cir.), *cert. denied*, 404 U.S. 939 (1971); *United States* v. *Martinez*, 446 F.2d 118 (2d Cir.), *cert. denied*, 404 U.S. 944 (1971); *United States* v. *Hynes*, 424 F.2d 754 (2d Cir.), *cert. denied*, 399 U.S. 933 (1970); and *United States* v. *Rao*, 394 F.2d 354 (2d Cir.), *cert. denied*, 393 U.S. 845 (1968), *reh. denied*, 393 U.S. 972 (1968), so long as it included language, as did the charge here, emphasizing that no juror was expected to yield a conscientious conviction. Indeed, in *Jennings*, *Martinez* and *Rao*, this Court upheld the supplemental charge even in the presence of aggravating circumstances not present in this case. Here, not only did Judge Gagliardi not inquire of the jury how it was deadlocked, but the jury did not inform the judge of the nature of the split.* Further Judge Gagliardi's supplemental charge is clearly "weaker" than the one given in *Rao*, since there is no

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* In response to the trial judge's inquiry whether more deliberations would be helpful in resolving any disputes the forewoman answered: "I think there is too much variance in the vote" (Tr. 283).

mention here that a minority juror should be "absolutely convinced that the majority is wrong" before abiding by his own convictions. *United States* v. *Rao*, *supra*, 394 F.2d at 356. Judge Gagliardi stressed, moreover, both before and after quoting from the *Allen* decision itself, that no juror may vote for any verdict which does not represent his or her considered judgment. In view of these repeated statements of the judge that no juror was expected or asked to abandon a conscientious conviction, little likelihood exists that any juror could construe the court's instruction as requiring him to defer to the will of a majority for conviction, if such existed before the charge.

Although DeVone claims that the charge was particularly coercive in this case, he has not explained how the *charge* could have prejudiced the jury. In fact, the charge apparently had no rapid impact on the jury which "dissipate[d] any lingering doubts" (*United States* v. *Hynes*, *supra*, 424 F.2d at 758), as the verdict was delivered one hour and twenty-five minutes later. In *Hynes* the jury returned a guilty verdict five minutes after the charge.

CONCLUSION

The judgment of conviction should be affirmed.

Respectfully submitted,

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United States Attorney for the Southern District of New York, Attorney for the United States of America.

RONALD L. GARNETT,
MICHAEL B. MUKASEY,
Assistant United States Attorneys, Of Counsel.

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Form 280 A. -Affidavit of Service by Mail

AFFIDAVIT OF MAILING

State of New York)
County of New York)

Annabelle Chaney being duly sworn deposes and says that he is employed in the office of the United States Attorney for the Southern District of New York.

Stating also that on the **26** day of **September 1975** he served a copy of the within **BRIEF** by placing the same in aproperly postpaid franked envelope addressed:

WALTER J. HIGGINS, JR, ESQ.,
Maloney,Viviani & Hi ggins
Attorney for Appellant
1290 Avenue of the Americas
New York, NY 10019

And deponent further says that he sealed the said envelope and placed the same in the mailbox for mailing at the United States Courthouse, Foley Square, Borough of Manhattan, City of New York

A. Loney

Sworn to me before this

26 day of Sept 1975

Ronald L. Garnett

RONALD L. GARNETT
Notary Public, State of New York
No. 31-4512144
Qualified in New York County
Commission Expires March 30, 1977